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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 711

DOMINICK E. BARTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 17a-20a) is reported at 400 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1968. (Pet. App. A, p. 16a.) On September 26, 1968, by order of Mr. Justice Stewart, the time for filing a petition for a writ of certio-

rari was extended to November 5, 1968. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly permitted relevant evidence of other possibly criminal acts to go to the jury.
2. Whether the trial court erred in permitting the government's summary of petitioner's 1961 income to go to the jury.
3. Whether the jury was properly charged on the element of willfulness.
4. Whether petitioner should have been permitted to argue to the jury that his 1959 unreported income was partially offset by an alleged carry-back loss on another investment in a company which went bankrupt in 1961.

STATUTE INVOLVED

The Internal Revenue Code of 1954 provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> [26 U.S.C. 7201.]

STATEMENT

After a jury trial, petitioner was convicted on two counts charging that he willfully attempted to evade and defeat his income taxes for the years 1959 and 1961, by filing false and fraudulent returns, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment charged that petitioner had taxable income of $202,693.25 in 1959, whereas he reported $7,167.00, and had taxable income of $19,190.63 in 1961, whereas he reported $10,400.00. Petitioner was sentenced to three years' imprisonment on Count I and to one and one-half years' imprisonment on Count II, the sentences to run concurrently.

As the court below found, the facts in this case "are not susceptible to easy summarization." (Pet. App. A, 17a.) In substance, the evidence showed that in 1959 petitioner was engaged in large-scale cash sales of munitions to the Dominican Republic and that he attempted to evade the tax on the income he derived from these sales by funnelling large amounts of currency through a "front" or "sham" corporation and foreign bank accounts.

Early in 1959 in Cleveland, petitioner solicited a job from one Naiman as sales agent to dispose of several aircraft through an acquaintance of petitioner who was associated with the recently installed Castro government in Cuba (Tr. 84, 86, 275-276, 279). The aircraft sale to Cuba never materialized (Tr. 279-280). However, while in Miami, petitioner entered into an arrangement with the Consul for the Dominican Republic in Miami to procure munitions for the Dominican Republic (Tr. 238-239). He utilized the

aircraft for which he was sales agent, for the delivery of munitions and aircraft parts to Ferrando, the Dominican Republic's Consul in Miami (Tr. 498-500). For these sales petitioner received at least $50,000 (Tr. 216-219, 499). Petitioner opened a bank account in a Miami bank in the corporate name of Servicios Internacionales S.A. (Tr. 72-73), into which large amounts of cash and several checks from the Dominican Consul were deposited (Tr. 76-77; Ex. 26A-E). Petitioner was the sole authorized signatory on this account (Tr. 73). During this same period several drafts in amounts ranging from $5,000 to $16,000 were purchased in cash by petitioner and sent to Mr. Ganoom in Toledo, Ohio, for disbursement according to petitioner's direction. (Tr. 67-68, 326.) Sometime later petitioner purchased the Panamanian corporate shell, Servicios Internacionales S.A., from Gaspare De Maio for $500. (Tr. 219-221.)

Early in 1959 petitioner hired Max Garcia to locate munitions for him. (Tr. 235-236.) In March or April of 1959 Garcia accompanied petitioner to the Dominican Consulate where munitions deals were discussed between petitioner and Ferrando. On one occasion he accompanied petitioner to the Dominican Consulate when petitioner picked up a large bag full of United States currency. (Tr. 239-241.)

On July 23, 1959, petitioner entered his safe deposit box at the Central Bank & Trust in Miami, extracted $150,000 from at least $200,000 in currency in the box (Tr. 42) and purchased a cashier's check (Tr. 42-43; Ex. 12) payable to Andrew Psalidas, as trustee. Shortly thereafter petitioner sent Psalidas to

Nassau, Bahamas to open a checking account in the name of Servicios Internacionales with the $150,000 cashier's check. Petitioner was sole signatory on checks on this account. (Tr. 125-126, 134-135.) Petitioner characterized Servicios to Garcia as a "front". (Tr. 255.)

In the summer of 1959, petitioner sent Garcia to North Carolina to pick up a shipment of arms. Garcia brought the arms to Fort Pierce, Florida, where he and several others loaded them aboard a yacht belonging to petitioner. (Tr. 246-250.) While Garcia paid $12,000 cash (supplied by petitioner) for the munitions petitioner told him that they were worth $307,000 to him (Tr. 246-248, 253).

On July 24, 1959, the cashiers at the First National Bank of Miami cashed a $300,000 check on the account of Ferrando payable to Emanuel Perez Sosa, a ranking member of the Dominican Consulate. Sosa was accompanied by petitioner and the $300,000 was counted and given to petitioner. (Tr. 14, 24; Ex. 4.)

In August, 1959, petitioner again dispatched Psalidas from Miami, this time to Panama, to open up bank accounts in the name of Servicios with petitioner's as the sole authorized signature on the account. On this occasion Psalidas deposited $70,000 in currency which had been given him by petitioner in Miami. (Tr. 105-110.)

A major portion of the 1961 income was attributable to petitioner's conversion to his own personal use of $25,000 of a loan made by one Meissner, who was induced by petitioner to borrow the money which

was to be used solely as a bid on a bankrupt Canadian Corporation. (Tr. 435, 441.) Meissner was told that whether the bid was successful or not the bid money would be returned to him (Tr. 438-439). Instead, unknown to Meissner, the bid money was returned within a month to petitioner in Miami and then disbursed for his own purposes. (Tr. 394-398.) Petitioner falsely told Meissner that his money was still up in Canada. (Tr. 439-440.)

Additional 1961 income of petitioner was established by his sale of 5,900 shares of Consolidated Empire stock to six individuals for $5,900 (Tr. 367-384). Petitioner's cost for the 5,900 shares was $65.20 (Tr. 367-384, 427, 470, 475). Mr. Gaspar DeMaio and Mr. Al Mims, also testified about petitioner's unreported sale of $2,500 of aircraft parts. (Tr. 228, 232.)

In 1961 petitioner went to see an accountant, one McConlogue, for the preparation of his 1960 tax return. Upon inquiring McConlogue ascertained that petitioner had not filed a return for 1959; petitioner told McConlogue that he felt any income he received in 1959 was not taxable "because it was from a foreign source". (Tr. 351.) The foreign source to which petitioner referred was the shell corporation, Servicios. (Tr. 353.) Petitioner told McConlogue that he had "loans" (Tr. 353-354) from Servicios. McConlogue advised petitioner that to the extent that he was entitled to a salary the "loans" would constitute income which he should report. Petitioner did not advise McConlogue that he was the sole stockholder nor that all the money in the Servicios accounts came from petitioner, nor did he explain the munitions transactions with the Dominican Republic in Miami.

On the basis of the evidence in the record, petitioner's correct taxable income for 1959 was $247,697 rather than the $7,167 reported, and for 1961 was $21,223 rather than the $10,400 reported. (Tr. 542.)

ARGUMENT

1. Although petitioner contends (Pet. 7) that evidence of a prior offense was improperly admitted, there was no testimony that petitioner committed any prior crime. There was only a possible inference of illegal conduct from the testimony—originally received without objection (Tr. 500)—that customs agents seized an airplane and its cargo of munitions. That testimony was stricken after petitioner's very belated objection (Tr. 507-508),[1] but it was stricken only out of an abundance of caution. The testimony was relevant to the issues of the tax case, since the proof showed that petitioner's 1959 unreported income arose from the shipment of munitions to the Dominican Republic. See *Capone* v. *United States*, 51 F. 2d 609, 619 (C. A. 7), certiorari denied, 284 U.S. 669.

2. Nor is there merit in the argument (Pet. 8) that the court erred in admitting the government's summary of petitioner's 1961 income, which characterized

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[1] The trial court instructed the jury "to disregard and withdraw from your consideration that portion of the testimony that related to the seizure of the arms on the plane and the ammunition at the airport by certain representatives of customs.

"Please understand that nothing related to that may be considered, and in no sense may the jury draw any inference of any improper conduct or illegal conduct in connection with this matter. * * *" (Tr. 508.)

the Meissner item as "income" to petitioner. There was ample evidence (Tr. 438-443, 459) that petitioner had converted this $25,000 to his own use and, as the court below found, the trial court "scrupulously examined the proposed summary and charts prior to admission, and thereafter painstakingly and repeatedly cautioned the jury as to their purpose." (Pet. App. A, p. 20a.) This conclusion is supported by the record. (Tr. 533-534, 538, 540, 548, 550, 551, 593.) The jury could not have been misled into the notion that it was required to accept the Government's determination that the Meissner item was income. *United States* v. *Johnson*, 319 U.S. 503, 519.[2]

3. In its charge to the jury the trial court stated (Tr. 608-609):

> As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

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[2] It should be noted, moreover, that this contention goes only to Count II of the indictment, relating to 1961. On that count petitioner received a jail sentence to run concurrently with the sentence on Count I. That sentence would still be supported by the first count. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

There was no objection. (Tr. 611.) Petitioner now claims that this charge constitutes plain error. (Pet. 8-9.) The court below found, however, (Pet. App. A, p. 20a), that the instructions on willfulness, when considered as a whole, "properly presented this issue to the jury." The instruction complained of is not reversible error if the other instructions on willfulness properly present the issue. *United States* v. *Wilkins*, 385 F. 2d 465, 473-474 (C.A. 4); *United States* v. *Releford*, 352 F. 2d 36 (C.A. 6); *United States* v. *Denton*, 336 F. 2d 785, 788 (C.A. 6); *United States* v. *Littlejohn*, 96 F. 2d 368, 381-382 (C.A. 7), certiorari denied, 304 U.S. 583; *Imholte* v. *United States*, 226 F. 2d 585, 590-591 (C.A. 8); *Sherwin* v. *United States*, 320 F. 2d 137, 148-151 (C.A. 9), certiorari denied, 375 U.S. 964; *Elbel* v. *United States*, 364 F. 2d 127, 134 (C.A. 10), certiorari denied, 385 U.S. 1014. It is true that the Fifth Circuit held to the contrary in *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986, but in that case willfulness was the crucial issue, which is not the case here. *Mann* is further distinguishable from the case at bar in that here the proof shows affirmative acts of fraud (setting up a sham corporation as a "front") in addition to filing the false return. See *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964.

4. Equally without merit is petitioner's final argument (Pet. 9), that he should have been permitted to argue that an alleged loss incurred by him in 1961 on the Niagara Crushed Stone investment could be carried back as an ordinary loss to offset part of the un-

reported income for 1959. This argument was founded on the theory that the alleged $150,000 loss on Niagara was an ordinary (as distinguished from a capital) loss incurred in the course of his "business of investing." However, there is no evidence that petitioner was in the business of investing. The evidence is clear that petitioner was entitled to deduct no more than a maximum of $1,000 from his 1959 unreported income of $247,697. See 26 U.S.C. 1211(b) and *Whipple* v. *Commissioner*, 373 U.S. 193. Moreover, since the loss, if any, was not incurred until 1961 (Tr. 308) and, so far as appears, at a time subsequent to the filing of the 1959 return, it could not be used to reduce the 1959 unreported income for purposes of criminal prosecution. *Willingham* v. *United States*, 289 F. 2d 283, 287-288 (C.A. 5), certiorari denied, 368 U.S. 828.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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